

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6399 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
2. To be referred to the Reporter or not? : NO
3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge? : NO

B B SHROFF

Versus

HEIRS OF MANGUBHAI F PATEL

Appearance:

MRS KETTY A MEHTA for Petitioner
Mr.Sirish Joshi for respondents

CORAM : MR.JUSTICE M.S.SHAH

Date of decision: 09/07/1999

ORAL JUDGEMENT

1. In this petition under Articles 226 and 227 of
the Constitution the petitioner herein-Sheth B.B.Shroff
Valsad Peoples Cooperative Balk Ltd has challenged the
judgment and order, dated 26.3.91 passed by the Gujarat
State Cooperative Tribunal in Review Application
No.25/90.

2. The facts leading to filing of this petition are as under:

2.1 On 18.12.1971, Mangubhai Fakirbhai Patel, husband of respondent No.1 herein, and father of respondent Nos.2 to 7 applied to the petitioner-Bank for loan in sum of Rs.10,000/- . In the application form (Annexure "A1" at page 15) the applicant had mentioned that his native place was village Halar, but he was residing at that time at Laxmi Villa, Solanki Street, Dharampur Road, which premises are admittedly in Valsad. On the basis of the said application, it appears, the request of Mangubhai Fakirbhai Patel for loan was sanctioned on 6.1.1972, and Mangubhai was granted the loan. Respondent Nos 8 to 10 herein/or their predecessors also stood guarantors for repayment of the loan. Since the amount borrowed by Mangubhai Fakirbhai was not repaid, and he expired by the time the petitioner-bank filed suit for recovery, the heirs of Mangubhai were joined as defendants in Lavad Suit No.783/79.

2.2 In the said suit respondent Nos 1 to 5 submitted application-Exh.124 that as per the bye-laws of the petitioner-bank, only residents of Valsad could become members of the petitioner-bank. The deceased was not a resident of Valsad, and therefore, he could not have been made a member of the petitioner-bank. Hence, the transaction in contravention of the petitioner-bank's bye-laws was illegal and, therefore, the suit was not maintainable and was liable to be dismissed at the threshold. The Board of Nominees heard the said application and ordered that the issue raised by the defendants was required to be considered as a preliminary issue. After hearing the parties, the Board of Nominees passed the order dated 1.2.1990(annexure "B") holding that it was not open to the defendants to raise the contention that deceased Mangubhai was wrongly made a member of the petitioner-Bank and all that was necessary was to see whether the borrower was a member of the bank or not. That even if the borrower was wrongly made a member of the bank, the Board of Nominees had jurisdiction to proceed with the suit. However, the Board of Nominees found fault with the drafting of the plaint. In the cyclostyled form the petitioner bank had mentioned that defendant No.1 (widow of the deceased) was a member of the petitioner-plaintiff-bank, but no evidence was adduced to show that defendant No.1 was a member of the petitioner-Bank. On that ground, the Board of Nominees dismissed the suit holding that the court had no jurisdiction to entertain the suit as these defendants were not members of the petitioner-bank.

2.3 The petitioner-bank, therefore, carried the matter in appeal, being Appeal No.62/90, before the Gujarat State Cooperative Tribunal. The Tribunal accepted the contention of the bank that the suit ought not to have been dismissed on the ground that the defendants were not members of the petitioner-Bank because the loan was not taken by the defendant No.1, but by her late husband, and the defendant No.1 (widow of the deceased) and the other heirs of the deceased were joined as defendants in their capacity as heirs of the deceased who was a member of the petitioner-Bank, the bank had submitted application in cyclostyled form which resulted into the aforesaid mistake and the Board of Nominees ought to have permitted the bank to amend the application to correct the said mistake, but for the said technical mistake the Board of Nominees ought not to have dismissed the suit. The Tribunal, therefore, by its order dated 31.8.90 (annexure "C") allowed the appeal and set aside the order of the Board of Nominees with a direction to proceed with the trial of the suit from the stage of examination of witnesses and to decide the suit on merits.

2.4 Thereafter, respondent Nos 1 to 5 herein moved the Tribunal by filing Review Application No.25/90 contending that the Board of Nominees had dismissed the suit on the ground that the defendant No.1 was not shown to be a member of the bank and the Tribunal had found that it was a technical mistake and the opportunity for correcting the said mistake was required to be given but the defendants could not have been precluded from pressing the issue raised by them that the deceased could not have been made a member of the bank and, therefore, the entire transaction was illegal. The Tribunal accepted the said contention and held that it was still open to the defendants to press the aforesaid contention and that after deciding the said issue as a preliminary issue, the Board of Nominees may proceed further with the suit.

2.5 It is against the aforesaid order of the Tribunal allowing the review application that the present petition is filed.

3. Mrs.K.A.Mehta, learned counsel for the petitioner-bank submitted that the judgment and order of the Tribunal made on 31.8.90 allowing the petitioner-bank's appeal did not suffer from any error

apparent on the face of the record and that no ground for review was made out. The learned counsel for the petitioner further submitted that the deceased having stated in his application (annexure "A1) for loan that the deceased was residing at Valsad, the deceased was estopped from contending that the deceased was not a resident of Valsad and could not have been made a member of the petitioner-Bank. In that view of the matter, the Tribunal ought not to have permitted the respondents herein to raise any such issue before the Board of Nominees.

4. On the other hand, Mr.S.J.Joshi, Ld.counsel appearing for respondent Nos 1 to 5 vehemently opposed the said contention and submitted that since the Board of Nominees had dismissed the suit on the ground that defendant No.1 was not a member of the petitioner Bank and the Tribunal found that an opportunity should have been given to the petitioner-Bank to correct the mistake in drafting of the plaint, but there was no decision on the preliminary issue earlier raised by the defendants in application-Exh.124 that the deceased could not have been legally made a member of the bank and therefore the entire transaction was illegal. It was submitted by Mr.Joshi that the Tribunal has rightly allowed the review application permitting the defendants to press the preliminary issue which was already raised by them before the Board of Nominees.

5. Having heard the learned counsel for the parties, the argument of Mr.Joshi appears to be only *prima facie* attractive as in the order dated 1.2.1990 of the Board of Nominees as well as in the order dated 31.8.90 of the Tribunal, the discussion was mainly about the mistake in drafting the plaint, but the question about legality or otherwise of the transaction was not decided. However, the observations made in the last para of the judgment of the Tribunal would show that the Tribunal had expressed its view that the Board of Nominees was only required to consider whether the deceased was a member of the petitioner-Bank or not and that if the deceased was a member of the bank, the Board of Nominees had the jurisdiction to entertain and decide the suit. It was for this reason that the Tribunal had mentioned in the operative part of its order that the suit was remanded to the Board of Nominees for its decision on merits without giving liberty to defendants to press the issue about legality or otherwise of the transaction on the allegation that the deceased was not residing at Valsad. Having thus clearly expressed its view and having given the direction in the operative part of its judgment, it

was not open to the Tribunal to reconsider the question and to permit the defendants to raise the issue about legality or otherwise of the transaction and consequently the issue of jurisdiction of the Board of Nominees.

6. In any view of the matter, Mrs.Mehta for the Bank is also justified in contending that once the deceased himself had become a member of the bank, he was bound by the statement made by him in the application including his address at Valsad and that having borrowed the loan from the bank, the deceased was estopped from raising any contention to the effect that the deceased could not have been made a member of the bank and so also the heirs of the deceased, against whom the present suit is filed in their capacity as heirs of the deceased, were estopped from raising such a contention.

7. In view of the above discussion, this petition is allowed. The impugned order dated 26.3.91 of Gujarat State Cooperative Tribunal in Review Application No.25/90 is hereby set aside and the review application stands dismissed. The Board of Nominees shall proceed further and decide Lavad Suit No.783/79 on merits. The issue as to whether the deceased could have been made a member of the plaintiff-petitioner-Bank or not stands concluded by the findings given hereinabove. In other words, Application Exh.124 hereby stands rejected and the Board of Nominees shall proceed with the trial of the suit on merits.

8. Since the Lavad Suit registered at Surat is pending since 1979 the Board of Nominees (Camp at Valsad) is directed to hear and decide Lavad Suit No.783/89 within three months from the date of receipt of the writ of this Court or from the date of receipt of a certified copy of this judgment, whichever is earlier.

9. Rule is made absolute to the aforesaid extent with costs throughout.

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